

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1975

No.

76-124

MANUEL FEDERICO MADRID,

Petitioner

-v-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1975

No. _____

MANUEL FEDERICO MADRID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, Manuel Federico Madrid,
prays that a Writ of Certiorari issue to
review the judgment of the United States
Court of Appeals for the Fifth Circuit,
entered in the office of the clerk of
that court on May 24, 1976.

OPINIONS BELOW

On March 28, 1975, the Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit was affirmed and is reported at 510 F.2d 937.

On Petition for Rehearing it was remanded for an evidentiary hearing on the lawfulness of the stop and search of Petitioner's vehicle which is reported at 517 F.2d 937.

The Petitioner's appeal from the findings of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on May 24, 1976. The opinion is unreported and appears as Appendix A.

JURISDICTION

On May 24, 1976, the United States Court of Appeals for the Fifth Circuit

affirmed the findings of the District Court. The Petition for Rehearing was timely filed and was denied on June 28, 1976. This petition for certiorari was filed less than 30 days from the date aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the stop of the Petitioner by Border Patrol agents at a checkpoint that was not reasonably located and was not a permanent checkpoint is consistent with the rights guaranteed to Petitioner under the Fourth Amendment.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against reasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 8, United States Code, §1324 (a)

(2) Title 8, United States Code, §1325.

STATEMENT of the CASE

The Petitioner was convicted in the United States District Court for the Western District of Texas on two counts of transporting illegal aliens in violation of Title 8, United States Code, §1324 (a) (2). He was sentenced to confinement for five years on each count, the sentences to run concurrently.

Petitioner had previously been convicted of violating Title 8, United States Code, §1325 and had been placed on probation for that violation. The

District Court used the evidence presented at the trial to revoke the probated sentence. The appeal of Petitioner's conviction and the appeal of the revocation of probation were consolidated for the purposes of his appeal to the United States Court of Appeals for the Fifth Circuit. The decision of the District Court was affirmed, but the Petition for Rehearing was granted and the case was reversed for the sole purpose of remanding to the District Court for an evidentiary hearing on the lawfulness of the stop and search of Petitioner's vehicle.

At the evidentiary hearing the District Court found that the checkpoint was fixed and permanent and that it was a reasonable distance from the border on a main traveled highway directly leading from the border. Based on these findings,

the District Court further found that the stop and search of the Petitioners vehicle was lawful and valid. This finding was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed. Petition for Rehearing was denied on June 28, 1976.

STATEMENT OF FACTS

On January 19, 1974, two United States Border Patrolmen were manning a checkpoint in New Mexico on Highway 70-82 at a point approximately 1.8 miles east of the White Sands Missile Range exit for the purpose of determining the citizenship of people passing through the checkpoint.

The main highway leaving El Paso, Texas, near the Mexican border area is Interstate 10 which leads to Las Cruces, New Mexico, approximately forty miles away, where it connects with Interstate 25. At that point

Interstate 10 branches west to Deming, New Mexico, and Interstate 25 leads north to Albuquerque, New Mexico. At Las Cruces, several miles north of the Interstate 10-Interstate 25 intersection, Highway 70-82 intersects Interstate 25 in a generally east and northeasterly direction toward Alamogordo, New Mexico. The location of the checkpoint was approximately 22.2 miles east of the point where Highway 70-82 intersects Interstate 25. See Appendix B.

The area between Las Cruces and the checkpoint is sparsely populated desert area with several mobile home parks and a small town with a population of about 2,000.

The checkpoint was set up to check eastbound traffic which could be travelers that had been moving north on Interstate 25 and turned right or had been

traveling south on Interstate 25 from the direction of Albuquerque, and had turned left onto Highway 70-82. Vehicles could also reach the point by traveling directly from Las Cruces or from one of the mobile home parks or the little town between Las Cruces and the checkpoint. Also, people leaving White Sands Missile Range and traveling east for more than 1.8 miles would be subject to the checkpoint procedure.

Traffic going through the checkpoint consisted of trucks and other commercial vehicles, military vehicles, missile range personnel, and vacationers. Every vehicle that reached the checkpoint was stopped. The Border Patrol Officers' at the checkpoint had no reason to believe that any of the vehicles that they stopped on January 19, 1974, had been at or near the border.

Travelers were warned that they would be required to stop by permanent signs which read "Caution, roadblock one mile ahead", "Caution, roadblock one-half mile ahead" and "Caution, roadblock 300 feet ahead". The checkpoint itself was an asphalt surfaced area at the side of the road that was about 300 feet long and 40 feet wide with rest room facilities, a small utility building and two light poles. At the point where vehicles were stopped was a sign that read "Military stop, roadblock".

All of the facilities that were being used by the Border Patrol as a checkpoint on January 19, 1974, were originally erected and were still maintained by the Army to hold traffic during missile firings. Whenever the Army needed to hold traffic, the point would be relinquished by the Border Patrol, if it was

using the point at that time.

There were no fixed hours of operation of the checkpoint by the Border Patrol. The hours of operation were determined by the manpower available. When the manpower was available, the point was supposed to be manned for one eight hour shift each day. But it was not even manned the full eight hours because it would take an hour or more for the officers to drive from Las Cruces and set up the checkpoint by opening the warning signs and setting out portable signs. It was abandoned in May of 1974.

The point was between 46 and 46-1/2 air miles from the international boundary.

On January 19, 1974, Petitioner's vehicle was stopped at the checkpoint and a Border Patrol officer asked him to state his citizenship to which he responded, "American citizen". In the same

vehicle were two women and a baby. It was later determined that the women were illegal aliens.

The only reason that Petitioner's vehicle was stopped was because all east-bound vehicles were being stopped. The officers had no reason to believe that Petitioner had crossed or been at or near the border. They had no reason to believe that he had been in contact with anyone who had been at or near the border. They had no reason to believe that he had committed any offense.

REASONS FOR GRANTING THE WRIT

This Court has recognized that there are three types of checking operations used by the Border Patrol in an effort to minimize illegal immigration; permanent checkpoints, temporary checkpoints and roving patrols. United States v. Martinez-Fuerte 74-1560 (Slip Opinion)

holds that the Border Patrol routine of stopping of a vehicle at a permanent checkpoint on a major highway away from the Mexican border for brief questioning of the vehicles occupants is consistent with the Fourth Amendment, and the stops may be made at reasonably located checkpoints in the absence of any individualized suspicion that the particular checkpoint contains illegal aliens.

Petitioner was stopped at a checkpoint that did not have the characteristics of a permanent checkpoint as outlined in the Martinez-Fuerte case, it was not on a major highway away from the border, and it was not reasonably located. This Court has not ruled on the legality of stops of the nature of the one in which Petitioner was involved.

ARGUMENT

The Border Patrol's stopping of the

Petitioner's vehicle was not made at a permanent checkpoint reasonably located on a major highway away from the Mexican border.

The evidence is uncontradicted that the facilities being used by the Border Patrol at the time of the stop were owned and maintained by the U.S. Army and the only notice to the public as to the purpose of the stop was the sign that said "Military stop, roadblock". This is very different from the San Clemente checkpoint that is the subject of United States v. Martinez-Fuerte, *supra*. At San Clemente there was a permanent building to house the Border Patrol office and temporary facilities. At the point where Petitioner was stopped, the Border Patrol had no permanent structures of its own and the Army had only restroom facilities and a small utility

building. The warning signs were erected by the Army for purposes of advising travelers when they would be stopped to protect them from dangers that they might be subjected to at times of missile firings. The sign that read "Military stop, roadblock" would certainly not indicate to anyone that his citizenship would be questioned when he stopped. There was no visible manifestation of the Border Patrol officer's authority at the checkpoint to question the citizenship of the persons stopped. In justifying checkpoint stops at San Clemente this Court has stated in United States v. Martinez-Fuerte (Slip Opinion p.15) that the regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve

the public interest. But there is nothing reassuring to a person who is stopped for what appears to be one valid purpose and he then suddenly finds that he was stopped for an altogether different reason.

The checkpoint at San Clemente was in operation about 70% of the time which is one of the characteristics which establishes its permanent nature. The checkpoint where Petitioner was stopped was in operation less than eight hours a day on the days that it was manned, but it was only manned when personnel was available. There was no real regularity in terms of time of operation of this checkpoint that would allow it to be characterized as "permanent". Further, the checkpoint has not been manned since May of 1974.

In summary, the Border Patrol neither

owned or maintained any of the facilities at the checkpoint location which it used to use on an irregular basis at the whim of the Army and there was nothing at the location to advise the public that it was a Border Patrol checkpoint or that the stop was being made to check for illegal aliens. All of the standards upon which this Court has justified stops at the San Clemente checkpoint are absent in this case, and the decision of the United States Court of Appeals for the Fifth Circuit holding this stop legal has the effect of denying the Petitioner his Fourth Amendment protection against law enforcement officers who made a standardless seizure of his person.

In addition to the requirement of permanency, this Court held in United States v. Martinez-Fuerte, supra, that

for the stop to be justified, it must be made at a reasonably located checkpoint on a major highway away from the border.

It is clear that Petitioner was not stopped at or near the border. The location of the stop was between 46 and 46 1/2 air miles from the international boundary. The question then becomes, was the stop made at a reasonably located checkpoint on a major highway away from the border. All of the evidence establishes that it was not. The checkpoint was on Highway 70-82 which connects Las Cruces and Alamogordo, New Mexico. To reach the point one starting at the border at El Paso, Texas, traveling by major highway would take Interstate 10 some 40 miles to Las Cruces, then change to Interstate 25 and travel on it until it intersects with Highway 70-82 where it would then be necessary to turn right

and travel 22.2 miles to the checkpoint. Highway 70-82 is not a major highway leading away from the border.

The traffic going through the checkpoint consisted of trucks and other commercial vehicles, military vehicles, missile range personnel and vacationers. The Border Patrol officers had no reason to believe that any of the vehicles or their occupants had been at or near the border, and there is no evidence to show that they had any reason to so believe.

Unless the Border Patrol has some reason to believe that it will intercept illegal aliens at the checkpoint, then it cannot be said that the checkpoint is reasonably located. The number of illegal aliens apprehended at the San Clemente checkpoint is some evidence that it is reasonably located, but there is no evidence of this nature or any other

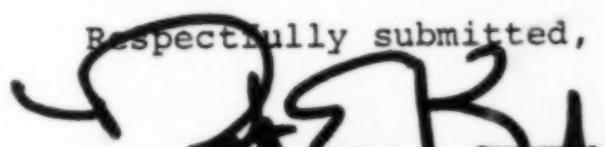
nature to establish the reasonableness of the location in the present case.

This checkpoint was not reasonably located as required by the standards set out in United States v. Martinez-Fuerte. It was not at the functional equivalent of the border as defined in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). There was no reasonable suspicion on the part of the Border Patrol agents that Petitioner had committed an offense which would justify the stop as required under United States v. Brignoni-Ponce, 422 U.S. 873 (1975). In that this checkpoint does not meet the standards of a permanent checkpoint as set out in United States v. Martinez-Fuerte, anything less than full compliance with those standards will not justify a checkpoint stop which is the equivalent of the seizure of a person, and involves

essentially the same type of intrusion upon the person that is occasioned by roving patrol stops without reasonable suspicion. United States v. Brignoni-Ponce, supra.

CONCLUSION

As a result of the opinion below, the Fourth Amendment rights of the Petitioner have been denied to him. For this reason and for the reasons set out above, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

(Argued January 17, 1975

Decided March 28, 1975)

Docket Nos. 74-1851 and 74-2296

In the Matter of the Petition of
 UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v. -

MANUEL FEDERICO MADRID,

Defendant-Appellant.

B e f o r e:

BROWN, Chief Judge and

GEWIN AND MORGAN, Circuit Judges

Appeal from the United States District
 Court for the Western District of Texas.

PER CURIAM:

Madrid's conviction for knowing transportation of aliens was affirmed by this Court, United States v. Madrid, 5 Cir., 1975, 510 F.2d 554, but later remanded for reconsideration in light of intervening Supreme Court cases¹ concerning checkpoint stops and border searches of vehicles, United States v. Madrid, 5 Cir., 1975, 517 F.2d 937. The District Court held an evidentiary hearing and determined that the stop in this case was made at a permanent checkpoint and therefore the stop and search of Madrid's automobile were valid. We affirm.

Recent Fifth Circuit case law has answered the question specifically left open

1. United States v. Ortiz, 1975, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623; United States v. Brignoni-Ponce, 1975, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607.

by the Supreme Court in Ortiz, 422 U.S. at 897 n. 3, 95 S.Ct. at 2589, 45 L.Ed. 2d at 629. We have held that Border Patrol officers may lawfully stop motorists at established permanent checkpoints for questions as to citizenship without reasonable suspicion or probable cause. United States v. Coffey, 5 Cir., 1975, 520 F.2d 1103, 1104; United States v. Santi-banez, 5 Cir., 1975, 517 F.2d 922, 923.

In our original opinion we found that this checkpoint, on Highway 70-82 near the White Sands Missile Range, was, as Madrid then conceded, a permanent checkpoint under United States v. Hart, 5 Cir., 1975, 506 F.2d 887, vacated and remanded, 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706.² Therefore, the only determination left to the District Court on remand was

2. 510 F.2d at 556.

whether the recent border cases³ negated our original finding that this was a permanent checkpoint.

The District Court held an evidentiary hearing and again determined that this was a "permanent fixed checkpoint"⁴ and therefore the stop was valid. Since this was a conviction for illegally transporting aliens who were in plain view in the back of the car⁵, we are not faced

3. See note 1, *supra*.

4. THE COURT: All right. I'm going to find, based on the mandate of the Fifth Circuit, based on the evidence that I was directed to hear in this case, I find that the checkpoint was fixed and permanent, maintained on a daily basis, eight hour shifts, with actual fixed buildings, turn-off areas and the like, and that it was in fact a permanent fixed checkpoint and that it was indeed a reasonable distance from the border between Mexico and the United States.

Tr. 45.

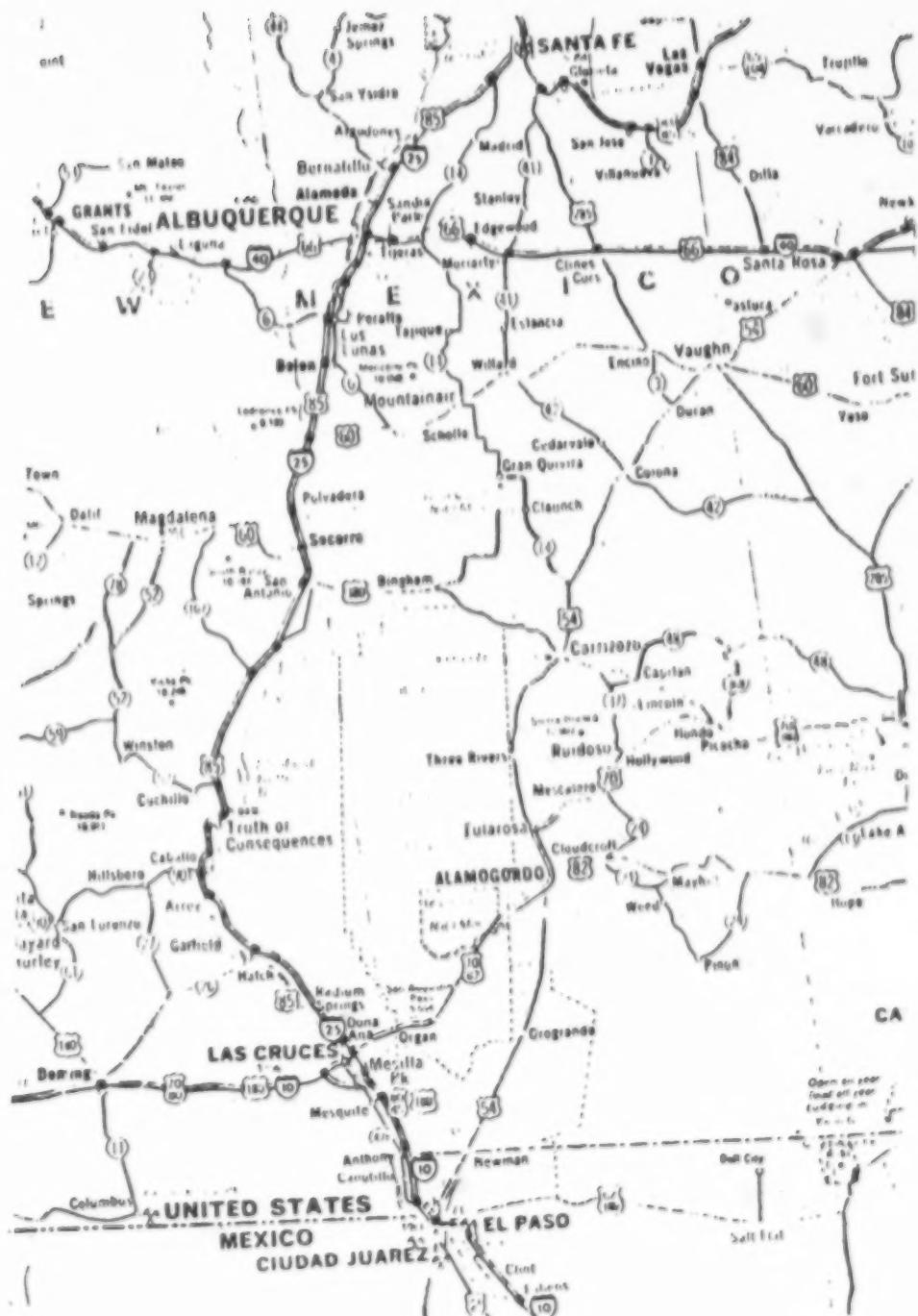
5. See United States v. Nunn, 5 Cir., 1976, 525 F. 2d 958, 959 n. 2.

with the question of suppression of evidence found via a search after the stop, a problem that has frequently confronted us. See, e.g., *United States v. Partner*, 5 Cir., 1976, 527 F.2d 1337; *United States v. Del Bosque*, 5 Cir., 1975, 523 F.2d 1251; *United States v. Byrd*, 5 Cir., 1975, 520 F.2d 1101, petition for rehearing denied, 1976, 528 F.2d 549.

AFFIRMED.

5. See United States v. Nunn, 5 Cir., 1976, 525 F.2d 958, 959 n.2.

APPENDIX B



One such square approximates 49 miles.

Supreme Court, U. S.
FILED
AUG 29 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 76-124

MANUEL FEDERICO MADRID,

Petitioner

-v-

UNITED STATES OF AMERICA,

Respondent

SUPPLEMENTAL APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT of the UNITED STATES
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No. 76-124

MANUEL FEDERICO MADRID,

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v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EXPLANATION

The purpose of this Supplemental
Appendix is to correct an error contained
in the original Appendix and to complete
the Appendix by adding the remainder of
the lower courts decisions.

Supplemental Appendix A is the decision of March 28, 1975, in which the Fifth Circuit affirmed the decision of the district court and which is reported at 510 F.2d 937.

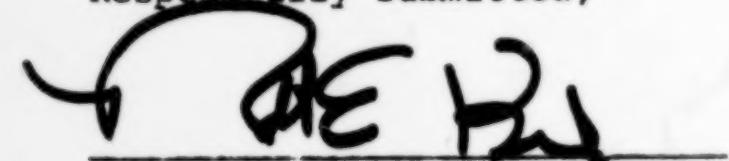
Supplemental Appendix B is the decision in which, on Petition for Rehearing, the case was remanded for an evidentiary hearing on the lawfulness of the stop and search of Petitioner's vehicle and which is reported at 517 F.2d 937.

The Petition for Rehearing which followed the decision set out in the original Appendix A was denied and appears here as Supplemental Appendix C.

Petitioner regrets this error and these omissions and trusts that they will not inconvenience this Honorable Court or weigh against the Petitioner whose reasons for petitioning for this Writ of Certiorari are meritorious and who again respect-

fully urges that it be granted.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX A
 UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

(Argued January 17, 1975

Decided March 28, 1975)

Docket Nos. 74-1851 and 74-2296

In the Matter of the Petition of

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

MANUEL FEDERICO MADRID,

Defendant-Appellant.

B E F O R E :

BROWN, Chief Judge and

MURRAH* and WISDOM, Circuit
 Judges.

*Senior Circuit Judge of the Tenth
 Circuit sitting by designation.

WISDOM, Circuit Judge:

This case began on January 19, 1974 when Manuel Federico Madrid drove up to the permanent checkpoint maintained by the border patrol near White Sands, New Mexico. Traveling with him were two girls and a young child. Border patrol agents stopped his car for routine questioning about citizenship, and Madrid identified himself as a United States citizen. Asked about his passengers, he shrugged. They, when questioned by agents, admitted to being Mexicans, illegally in the United States. When asked how they happened to be in the car, they explained that Madrid had picked them up hitchhiking. They also added that Madrid was related to them by marriage. Madrid told essentially the same story, but denied being related in any way to his passengers. The agents released Madrid but de-

tained the women for questioning.

Later, on further questioning, the girls changed their story. They explained that by prearrangement they had met a woman in Juarez, that she had accompanied them across a foot bridge over the Rio Grande, and, that after a bus ride to a suburban area, they had arrived at a house where they were met by Madrid. He was to drive them to Santa Fe, but their ultimate destination, they testified, was Chicago. Madrid, at trial, continued to assert that he had picked up the girls as they walked along the highway and that he did not know that they were aliens illegally in the United States. A jury, nonetheless found him guilty of two counts of knowing transportation of illegal aliens, in violation of 8 U.S.C. § 1324(a)(2). The trial court then revoked on a previous conviction of aiding and abetting aliens

to elude examination by immigration officials.

On appeal, Madrid challenges his conviction and the revocation of his probation. First, he asserts that because venue was not properly laid in the Western District of Texas, the trial court erred in refusing to transfer the case to the Southern District of New Mexico. Venue, however, need only be proved by a preponderance of the evidence, and it is enough if venue may be inferred from all of the evidence presented. See United States v. Trenary, 9 Cir. 1973, 473 F.2d 680; Bellard v. United States 5 Cir. 1966, 356 F.2d 437, cert. denied 385 U.S. 856, 87 S.Ct. 103, 17 L.Ed.2d 83. There was sufficient evidence here to support the conclusion that Madrid's passengers entered the United States at El Paso, Texas and that Madrid met them there.

He also contends that the trial court erred in admitting into evidence his prior confession, given in October 1973, to the transportation of illegal aliens. In that confession Madrid admitted that he had known that the twenty-six aliens in the trailer he was driving at the time of that arrest were illegal aliens. He explained, in the confession, that his part in that transaction was to transport the aliens from El Paso to Albuquerque. From there another driver was to take them to Chicago. He admitted that on numerous prior occasions he had participated in transporting illegal aliens. His confession thus indicated that as recently as three months before the transaction forming the basis of the present prosecution, Madrid had been engaged in transporting illegal aliens from El Paso, Texas to north-central New Mexico. The

prior offense, of which Madrid was convicted, was both recent and similar to the offense charged here. Admission of such evidence is a matter within the broad discretion of the trial court and is proper, where, as here, it is introduced not to show a propensity to commit crime but to show knowledge. United States v. Fonseca, 5 Cir. 1974, 490 F.2d 464; United States v. Bryant, 5 Cir. 1974, 490 F.2d 1372. See United States v. Broadway, 5 Cir. 1973, 477 F.2d 991. Knowledge is a necessary element of the crime defined by 8 U.S.C. § 1324(a)(2). Madrid's defense at trial was that he did not know that the girls he was transporting were illegal aliens. Furthermore, there is no merit to the argument that the trial judge, in his charge to the jury, failed to give adequately limiting instructions.

Madrid abandoned, on oral argument, his contention that the prior offense was so dissimilar to the offense charged below as to be inadmissible. He now contends that it was error for the court to admit into evidence the defendant's confession to that prior offense. This contention is without merit. Madrid made the statement in question after he had been given his "Miranda" warnings. Nothing suggests that it was not made voluntarily. There was nothing inherently improper in allowing it into evidence. See *Reid v. United States*, 9 Cir. 1964, 334 F.2d 915; *Stewart v. United States*, 9 Cir. 1962, 311 F.2d 109. Nor was there anything in the statement that was both prejudicial and irrelevant to the purpose for which it was introduced. Indeed, the statement added the "plain, clear, and convincing proof" of the prior similar offense and

its circumstances that our case law requires. See *United States v. San Martin*, 5 Cir. 1974, 505 F.2d 918, 921-22. The need for such evidence did, we conclude, outweigh its possibly prejudicial effect.

Madrid also challenges the lawfulness of the stop and the admission of evidence obtained as a result of it. This was, however, a routine investigatory stop, and the checkpoint, although some forty miles north of the United States-Mexico border, was reasonably situated to intercept traffic, on Highway 70-82, bound northeast from border areas.¹ Three high-

1. One of the border patrol testified:

It's a permanent checkpoint that was built by the White Sands Missile Range for the purpose of stopping all the vehicles traveling the Highway 70-82 in order to fire their missiles over the highway . . . It's approximately 50 yards wide. It's a pull-off area alongside the highway. It has warning signs which allow traffic - warn traffic there

ways running north from the border or its immediate vicinity parallel the Rio Grande River. At Law Cruces, one road, Highway 70-82, heads northeast. The stop was made, the appellant conceded, at a "permanent checkpoint", as delineated in *United States v. Hart*, 5 Cir. 1975, 506 F.2d 887.² There this Court observed that the law of the Circuit holds that "permanent checkpoint searches of motor

is a road block ahead. There are three of these signs approximately five feet by six feet in dimension. There's a large stop sign there approximately five feet high, and the checkpoint also is equipped with lighting systems and cones in order to have traffic pull over to the side of the road by the stop sign. . . . [T]his particular highway, 70-82, is frequently used for transportation of illegal aliens into the interior of the United States.

2. In *United States v. Hart* this Court discussed border searches in detail and compiled a complete list, by categories, of all the border searches the Court has decided in the last two years.

vehicles conducted as 'border searches' for aliens . . . meet the reasonableness standards of the Fourth Amendment." 506 F.2d at 892. On this authority we uphold the lawfulness of the challenged stop. The disposition we make of the foregoing points of error relieves us of considering the appellant's contention that the trial court erred in relying on inadmissible evidence to revoke Madrid's probation.

The judgment of the trial court is affirmed.

SUPPLEMENTAL APPENDIX B
 UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

 Docket Nos. 74-1851 and 74-2296

Decided August 18, 1975

 In the Matter of the Petition of
 UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

MANUEL FEDERICO MADRID,
 Defendant-Appellant

 Appeals from the United States District
 Court for the Western District of Texas;
 Ernest Guinn, Judge.

ON PETITION FOR REHEARING
 (Opinion dated March 28, 1975,
 510 F.2d 554)

 B E F O R E:

BROWN, Chief Judge and

MURRAH* and WISDOM, Circuit
 Judges.

PER CURIAM:

It is ordered that the petition for
 rehearing filed in the above entitled
 and numbered causes be and the same is
 hereby granted for the sole purpose of
 remanding the case to the district court
 for an evidentiary hearing on the lawfulness
 of the stop and search of Madrid's
 vehicle. On remand, the district court
 should consider the case in the light of
 United States v. Ortiz, 1975 [43 L.W.
 5026, June 24, 1975]; --- U.S. ---, 95
 S.Ct. 2585, 44 L.Ed.2d ---, United States
 v. Buignoni-Ponce, 1975 [43 L.W. 5028,
 June 24, 1975, --- U.S. ---, 95 S.Ct.
 2574, 44 L.Ed.2d ---, and any other rele-

 *Of the Tenth Circuit, sitting by
 designation.

vant decisions of the United States Supreme Court or this Court relating to checkpoint stops or border searches of vehicles.

REVERSED AND REMANDED.

SUPPLEMENTAL APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

June 28, 1976

TO ALL COUNSEL OF RECORD

No. 75-3906 - USA v. Manuel Federico Madrid

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate

Procedure for issuance and stay of the
mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

OCT 28 1976

No. 76-124

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1976

MANUEL FEDERICO MADRID, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-124

MANUEL FEDERICO MADRID, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

Petitioner contends that the checkpoint at which his automobile was stopped for brief questioning of the occupants was not a permanent checkpoint and was not reasonably located.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of illegally transporting aliens, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals initially affirmed (Supp. Pet. App. A; 510 F. 2d 554) but later granted rehearing for the purpose of remanding the case to the district court for an evidentiary hearing and for further consideration of recent decisions of this Court (Supp. Pet. App. B; 517 F. 2d 937). After a hearing on remand, the district court found

that the stop of petitioner's vehicle occurred at a reasonably located, "fixed and permanent" Border Patrol checkpoint and that the stop and questioning of petitioner and his passengers were therefore reasonable (Tr. 45). The court of appeals again affirmed (Pet. App. A; 531 F. 2d 1329).

On January 19, 1974, petitioner's automobile was stopped at a Border Patrol checkpoint in New Mexico for a routine check of the occupants' citizenship. Petitioner claimed American citizenship. The agents determined, however, that two women passengers were Mexican citizens present in this country unlawfully.

Petitioner concedes, as he must, that stops for questioning may be made at reasonably located permanent checkpoints even in the absence of any particularized suspicion (Pet. 12). *United States v. Martinez-Fuerte*, No. 74-1560, decided July 6, 1976. He contends, however, that the place at which he was stopped was not a permanent checkpoint and was not reasonably located. The contrary findings of both courts below are amply supported by the record, and further review is not warranted.

The checkpoint was located in New Mexico on Highway 70-82,¹ 22.2 miles east of the intersection at Las Cruces of Highway 70-82 and north-south Interstate Route 25 (Tr. 8, 13).² The area between Las Cruces and the checkpoint is sparsely populated, containing only several mobile-home parks and a small town of about 2,000 per-

sons (Tr. 14, 34). No paved thoroughfare intersects the highway between Las Cruces and the checkpoint (Tr. 14), although the exit for the White Sands Missile Range is about two miles west of the checkpoint. The checkpoint location is about 46 air miles from the international border with Mexico (Tr. 10, 13-14).

Travelers driving east from Las Cruces were warned by three permanent signs that they would be required to stop ahead. Every vehicle approaching the checkpoint was stopped (Tr. 6, 8). The checkpoint included a pull-off area 300 feet long and 40 feet wide, which accommodated five lanes of traffic. There were two restrooms and a small building; floodlights were mounted on two permanent power poles (Tr. 9). During the time the checkpoint was in operation, rubber cones were placed on the highway to divert all traffic through the checkpoint (Tr. 16).

The checkpoint was operated eight hours per day, every day of the week,³ in tandem with another checkpoint further along Highway 70-82 at Alamogordo. The Alamogordo station operated 16 hours per day (Tr. 10). Other checkpoints on Interstate 25 and Highway 54 were maintained to intercept traffic along the major roads that run in a northerly direction from the border at El Paso (see map, Pet. App. B; Tr. 11, 18, 37).

From this brief summary it is apparent that substantial evidence supports the district court's finding that petitioner was stopped at a permanent checkpoint. Nothing in the record contradicts the district court's finding that

¹See map, Pet. App. B.

²The Border Patrol ceased to maintain the checkpoint involved here after May 1974, when another checkpoint on the same road assumed full-time responsibility for the traffic on Highway 70-82 (Tr. 25-26).

³Approximately once every two or three days, the Border Patrol would relinquish the checkpoint to the Military Police for about one half hour so that all traffic could be stopped during missile firings. The facility was originally built by the Military Police for this purpose (Tr. 17, 35).

the checkpoint was reasonably located. “[T]he choice of checkpoint locations is an administrative decision that must be left largely within the discretion of the Border Patrol * * *.” *United States v. Martinez-Fuerte*, *supra*, slip op. 19, n. 15. Like the San Clemente checkpoint at issue in *Martinez-Fuerte*, the checkpoint here satisfies each of the criteria prescribed by the Border Patrol to assure the effectiveness of checkpoints (slip op. 9-10, 19, n. 15).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.